# Lim Thian Hock @ Lim Thiam Hock v Lim Choon Hiok

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-928–09 OF 2011
SM KOMATHY JC
18 NOVEMBER 2013

*Civil Procedure — Striking out — Application to strike out action — Capacity — Whether plaintiff lacked mental capacity to instruct solicitors — Whether application was procedurally incorrect — Whether application mala fide — Expert evidence — Whether medical reports justified defendant's application — Rules of Court 2012 O 76*

On 3 June 2009 the plaintiff and his ex-wife (the defendant) had entered into a consent order, which recorded the division of properties or assets belonging to the plaintiff between them. On 22 September 2011, the plaintiff had commenced an action against the defendant to set aside the consent order ('the CO') by challenging the validity of the CO. However, when this case came up for case management the court was informed that the plaintiff had a brain tumour and that he could be suffering from dementia. The court was also informed that a report as to the plaintiff's mental condition would be duly obtained from a psychiatrist and submitted to the court. Subsequently, the parties attended a mediation to try and resolve the action amicably. Although the defendant was of the opinion that an agreement had been reached between the parties during the mediation, the plaintiff's solicitors wrote to the defendant's solicitors to request the defendant to cease further disposal off the assets until the determination of the plaintiff's action. The defendant claimed that the plaintiff's change of heart after the mediation arose from his mental condition. The defendant thus filed the present application challenging the authority of the plaintiff's solicitor to act for the plaintiff in this action on the grounds that the plaintiff lacked the mental capacity to instruct solicitors. By way of this application, the defendant applied under the inherent jurisdiction of the court to strike out the plaintiff's action. The plaintiff objected to the defendant's application on the grounds that it was procedurally incorrect, in that it ought to have been made under O 18 r 19 of the Rules of Court 2012 ('the ROC') and s 52(1) of the Mental Health Act 2001. The plaintiff also submitted that the application was made mala fide. The plaintiff further argued that the defendant's reliance on O 76 of the ROC and the test formulated in the case of *Masterman-Lister v Brutton & Co* was misconceived.

**Held**, making an order for the plaintiff to appoint a litigation representative:

(1) The case law referred to by the defendant justified the invocation of the

inherent jurisdiction of the court in support of this application. Thus, the plaintiff's objection to the defendant's application on the grounds that it was procedurally incorrect was rejected (see para 17).

(2) In view of the medical evidence adduced as to the plaintiff's medical condition, the allegation of mala fide could not be sustained. There was no merit in the plaintiff's suggestion that the defendant intended to delay and derail the trial. In the light of the medical reports, it was incumbent upon the defendant to make the present application (see para 21).

(3) The law provides that the plaintiff would lack the mental capacity to instruct solicitors and thus be precluded from bringing an action if he was a patient for the purposes of O 76 r 1 of the ROC. Although the plaintiff submitted that O 76 was primarily concerned with a litigant's capacity at the time of the institution of a suit and not thereafter, there was nothing to support this interpretation. As the English provision is in pari materia with O 76 r 10 of the ROC, the test formulated in the case of *Masterman-Lister v Brutton & Co* could be used to determine whether the plaintiff is a patient within the meaning of O 76 of the ROC and therefore had the capacity to litigate (see paras 22, 31 & 33–34).

(4) Although the two medical experts, engaged to provide expert medical evidence, had expressed conflicting views on the plaintiff's mental capacity, there were some common observations made as to the condition of the plaintiff. Both reports stated that the plaintiff was not aware of this action until he was presented with the facts pertaining to the case. It was also glaring from the reports of the two medical experts that the manifestation of the plaintiff's dementia rendered him unable to obtain information for himself and retain information relevant to a decision. Based on the views expressed in the medical reports it was clear that the plaintiff lacked the mental capacity to conduct proceedings, which included his capacity to instruct solicitors. Thus the plaintiff clearly failed the test in *Masterman-Lister v Brutton & Co* (see paras 44–47).

(5) An order was made for the plaintiff to appoint a litigation representative to take over the conduct of the proceedings within two weeks, failing which the application to dismiss the action would be allowed (see para 49).

**[Bahasa Malaysia summary**

Pada 3 Jun 2009, plaintif dan bekas isterinya ('defendan') telah memasuki satu perintah persetujuan, yang merekodkan pembahagian harta-harta atau aset-aset yang dimiliki oleh plaintif antara mereka berdua. Pada 22 September 2011, plaintif memulakan satu tindakan terhadap defendan untuk mengentepikan perintah persetujuan ('PP') dengan mencabar keesahan PP tersebut. Walau bagaimanapun, apabila kes ini bersedia untuk pengurusan kes, mahkamah dimaklumkan bahawa plaintif mempunyai tumor otak dan

bahawa dia mungkin mengalami demensia. Mahkamah juga dimaklumkan bahawa satu laporan berkenaan keadaan mental plaintif diperolehi daripada pakar psikiatri dan mengemukakannya ke mahkamah. Dengan itu, pihak-pihak menghadiri satu mediasi untuk cuba dan menyelesaikan tindakan tersebut secara baik. Walaupun defendan berpendapat bahawa satu perjanjian telah dicapai antara pihak-pihak ketika mediasi, peguamcara plaintif menulis kepada peguamcara defendan untuk menghentikan pelupusan lanjut aset-aset tersebut hingga keputusan dibuat mengenai tindakan plaintif. Defendan menghujahkan bahawa perubahan hati plaintif selepas mediasi adalah akibat daripada keadaan mentalnya. Defendan, dengan itu, memfailkan tindakan ini bagi mencabar kuasa peguamcara plaintif dalam tindakan ini atas alasan bahawa plaintif kekurangan kapasiti mental untuk memberi arahan kepada peguamcaranya. Melalui permohonan ini, defendan memohon di bawah bidang kuasa inheren mahkamah untuk membatalkan tindakan plaintif. Plaintif membantah permohonan defendan atas alasan bahawa ia salah dari segi prosedur, iaitu ia sewajarnya dibuat di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan s 52(1) Akta Kesihatan Mental 2001. Plaintif juga menghujahkan bahawa permohonan yang dibuat adalah mala fide. Plaintif seterusnya menghujahkan bahawa sandaran defendan pada A 76 KKM dan ujian yang dirangka dalam *Masterman-Lister v Brutton & Co* adalah satu salah tanggapan.

**Diputuskan**, memerintahkan plaintif melantik seorang wakil litigasi:

(1) Kes undang-undang yang dirujuk oleh defendan menjustifikasikan bangkitan bidang kuasa inheren mahkamah bagi menyokong permohonan ini. Oleh itu, bantahan plaintif ke atas permohonan defendan bahawa ia salah dari sudut prosedur ditolak (lihat perenggan 17).

(2) Berdasarkan keterangan perubatan yang dikemukakan mengenai keadaan perubatan plaintif, dakwaan mala fide tidak boleh dikekalkan. Tiada merit dalam cadangan plaintif bahawa defendan berniat melengahkan dan menjejaskan perbicaraan. Melihat pada laporan-laporan perubatan, defendan bertanggungjawab membuat permohonan ini (lihat perenggan 21).

(3) Undang-undang memperuntukkan bahawa plaintif kekurangan kapasiti mental untuk mengarahkan peguamcaranya dan dengan itu, terkecuali daripada membawa tindakan jika dia adalah seorang pesakit bagi tujuan A 76 k 1 KKM. Walaupun plaintif menghujahkan bahawa A 76 secara khususnya berkaitan dengan kapasiti pelitigasi semasa pemasukkan guaman dan bukan kemudian, tiada apa untuk menyokong tafsiran ini. Oleh kerana peruntukan Inggeris pari materia dengan A 76 k 10 KKM, ujian yang dirangka dalam kes *Masterman-Lister v Brutton & Co* tidak boleh digunakan untuk menentukan sama ada plaintif adalah pesakit

dalam maksud A 76 KKM dan dengan itu mempunyai kapasiti untuk melitigasi (lihat perenggan 22, 31 & 33–34).

(4) Walaupun kedua-dua pakar perubatan, diambil untuk memberikan keterangan pakar, telah memaklumkan pandangan yang bertentangan mengenai kapasiti mental plaintif, terdapat beberapa permerhatian sama yang dibuat mengenai keadaan plaintif. Kedua-dua laporan menyatakan bahawa plaintif tidak sedia maklum akan tindakan ini hinggalah dia dikemukakan dengan fakta-fakta berkenaan kes tersebut. Adalah juga jelas daripada laporan-laporan kedua-dua pakar perubatan bahawa manifestasi demensia plaintif menyebabkannya tidak mampu untuk mendapatkan maklumat bagi dirinya dan menyimpan maklumat terhadap relevan keputusan. Berdasarkan pandangan-pandangan yang dinyatakan dalam laporan perubatan, adalah jelas bahawa plaintif kekurangan kapasiti mental untuk menjalan prosiding, yang melibatkan kapasitinya untuk memberi arahan kepada peguamcaranya. Oleh itu, plaintif gagal ujian dalam *Masterman-Lister v Brutton & Co* (lihat perenggan 44–47).

(5) Satu perintah dibuat untuk plaintif melantik wakil litigasi untuk mengambil alih perjalanan prosiding dalam dua minggu, yang mana jika gagal permohonan untuk menolak tindakan akan dibenarkan (lihat perenggan 49).]

**Notes**

For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

**Cases referred to**

*Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161, FC (refd)
*Bailey v Warren* [2006] EWCA Civ 51, CA (refd)
*Dunhill (by her litigation friend) v Burgin* [2012] EWCA Civ 397, CA (refd)
*Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell and another* [2003] 3 All ER 162, CA (distd)
*Richmond v Branson & Son* [1914] 1 Ch 968, Ch D (refd)
*Tan Sri Eric Chia Eng Hock v PP (No 1)* [2007] 2 MLJ 101, FC (refd)
*William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555, SC (folld)

**Legislation referred to**

Mental Health Act 2001 ss 51, 52(1)
Rules of Court 2012 O 18 r 19, O 76, O 76 rr 1, 2, 10
Rules of the Supreme Court [UK] O 80, O 80 rr 1, 10(1)

*Gopal Sreenevasan (PL Leong with him) (Sreenevasan Young) for the plaintiff.*
*Gobind Singh Deo (Aliff Benjamin with him) (Thomas Philip) for the defendant.*

**SM Komathy JC:**

**[1]** The right of a litigant to commence and conduct court proceedings is a basic and fundamental right and O 76 of the Rules of Court 2012 ('ROC') empowers the court to intervene and deny this right only in instances where the litigant lacks the mental capacity to do so if he is an infant or is a mentally disturbed person. The dispute in this case concerned the mental capacity of the plaintiff to instruct his solicitors to continue with this suit.

THE APPLICATION

**[2]** The defendant applied under the inherent jurisdiction of the court to strike out the action on the ground that the plaintiff's solicitors warrant to act for the plaintiff has come to an end due to his mental incapacity to conduct these proceedings. The authority of Thomas Philip to legally represent the plaintiff is challenged in these proceedings. In the alternative, the defendant sought an order of inquiry to determine whether the plaintiff is competent to retain solicitors and continue with the suit.

**[3]** The application is strenuously objected to by the plaintiff on both procedural and substantive grounds.

BACKGROUND FACTS

**[4]** First, the facts giving rise to this application. On 22 September 2011, the plaintiff who is in his late 70's, instituted this action against his ex-wife to set aside a consent order entered between them on 3 June 2009 through his erstwhile solicitors Messrs Kumar Partnership. He is now represented by the legal firm of Messrs Thomas Philip.

**[5]** The validity of the consent judgment recorded on 3 June 2009 is challenged in this action on the following grounds:

(a) The plaintiff had no knowledge of the consent order as he was being detained under the Emergency Ordinance and placed under restricted residence at the material time;

(b) The plaintiff did not appoint Messrs Kumar Partnership, nor consented to his assets being given to the defendant; and

(c) By way of the consent order, the defendant procured the assets and/or properties of the plaintiff as per schedule 11 of the consent order, estimated to be worth around RM360m or almost 90% of the plaintiff's total assets.

**[6]** On 13 June 2012, when the case was called up for case management, the court was informed that the plaintiff had a tumour in his brain and had been referred to a neurosurgeon to obtain a medical report on how the tumour may affect his mental condition. On 13 July 2012, the court was informed by the plaintiff's solicitors that the plaintiff had a pituitary tumour and was suspected to be suffering from dementia. The court was further informed that a report from a psychiatrist on the plaintiff's condition would be obtained and submitted to the court.

**[7]** Between 14 June 2012 and 27 November 2012, the defendant's solicitors wrote four letters to the plaintiff's solicitors seeking a copy of the medical reports. No reply was received. On 11 March 2013, a medical certificate dated 8 March 2013 that had been issued by Dr Goh Teck Leong of Pantai Hospital Batu Pahat was tendered to the High Court judge hearing Johor Bahru High Court Civil Suits 22NCVC-196–05 of 2012 and 22 NCVC-167–05 of 2012. The medical certificate stated that the plaintiff was, inter alia, suffering from 'Ischaemic Stroke and Dementia'.

**[8]** On 22 April 2013, the plaintiff and the defendant attended a mediation to try and resolve the action amicably. The defendant was of the view that an agreement had been reached with the plaintiff, having met alone with him. However, counsel for the plaintiff informed the mediation judge that he needed time to take instructions on some matters.

**[9]** On 14 May 2013, the plaintiff's solicitors wrote to the defendant's solicitors to complain about the defendant's disposal of the assets listed in the consent order and to request a written undertaking from the defendant to cease further disposal off the assets until the final determination of this action.

**[10]** The defendant's solicitors responded by raising the following:

(a) the sudden change in the plaintiff's position after allegedly agreeing to a settlement with the defendant during the mediation;

(b) the plaintiff's mental condition and his purported lack of capacity to instruct his solicitors based on the plaintiff's pituitary tumour and the medical certificate dated 8 March 2013; and

(c) Messrs Thomas Philip's authority and warrant to act.

**[11]** On 19 June 2013, Messrs Thomas Philip informed the defendant's solicitors that the plaintiff was fully capable of instructing them in respect of this action and furnished them with a psychiatrist report dated 31 August 2012 by Dr Bharathi Vengadasalam of Pantai Hospital, Kuala Lumpur. The defendant then consulted her own psychiatrist, Dr Prem Kumar

Chandrasekaran who after examining the results of the tests conducted on the plaintiff by Dr Bharathi and the medical certificate issued by Dr Goh, advised her that it was improbable that the plaintiff was capable of properly instructing solicitors at the time of Dr Bharathi's report.

**[12]** On 9 July 2013, the defendant filed the present application to challenge the authority of Thomas Philip to act for the plaintiff on the ground that the plaintiff lacked the mental capacity to instruct solicitors.

ISSUES

**[13]** The principal issues raised in this application are:

(a) is the defendant entitled to rely on inherent jurisdiction to make the application;

(b) is the application made mala fide; and

(c) does the plaintiff have the necessary mental capacity to instruct.

INHERENT JURISDICTION

**[14]** The first objection to the application is based on the well-established principle that a litigant cannot rely on the inherent jurisdiction of the High Court to seek substantive relief when there are express statutory provisions which provide for such relief. The present application, it is submitted, is misconceived as it invokes the inherent jurisdiction of the court to dismiss the action based on the plaintiff's alleged lack of mental capacity to instruct solicitors. It is said that this application should have consequently been made under O 18 r 19 of the Rules of Court 2012, s 3 of the Mental Disorder Ordinance 1952 (repealed) and s 52(1) of the Mental Health Act 2001. The decisions of the Federal Court in *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161 and *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 were cited in support of this proposition.

**[15]** In answer, the defendant pointed out that the instant application is not an application for the court to rule on the mental capacity of the plaintiff, but an application specifically made to challenge the authority of Thomas Philip to act for the plaintiff. The challenge may be made in various ways, but it is a challenge that has to be taken independently of the action itself in that the issue of authority of the plaintiff's solicitors should not be an issue to be tried in the action, but must be the subject of an application. In order to determine if Thomas Philip had the requisite authority from the plaintiff, the plaintiff's mental capacity becomes an issue as the determination of the plaintiff's mental

capacity is tied to his capacity to instruct Thomas Philip. In support of this proposition, the defendant cited the following passage in the case of *Richmond v Branson & Son* [1914] 1 Ch 968 at p 973.

**[16]** The defendant also referred to the decision of the Supreme Court in *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 to justify the invocation of the inherent jurisdiction of the court in support of this application. It was held by the court that when a challenge to a solicitor's authority is mounted, the court 'in its inherent jurisdiction may entertain the challenge made orally and may order the action to be struck off if there was sufficient evidence or admitted evidence that there is no action properly before it.'

**[17]** The decision of the Supreme Court in *William Jacks* provides the answer to the objection taken on behalf of the plaintiff on this point. I therefore reject the submission that the application is procedurally incorrect.

MALA FIDE

**[18]** The next objection to the application was founded on the ground that it is made mala fide and in furtherance of the defendant's attempt to wrongfully procure maximum benefits from the purported consent order. The plaintiff queried the motive in making the application just after the issuance of the plaintiff's solicitors letter to the defendant for an undertaking not to deal with the assets which had been distributed to her pursuant to the consent order dated 3 June 2009. It was submitted that it is vital to note that the defendant was first informed about the plaintiff's tumour on 13 June 2012, but the present application was only made in June 2013. The delay in the filing of the application indicated that it was not made in good faith and is intended to delay the proceedings to enable the defendant to continue with the dissipation of the properties mentioned in the consent order.

**[19]** The defendant refuted the submission that the application was made mala fide. It was pointed out that the defendant had written four letters to request for a copy of the relevant medical reports on the plaintiff, upon being first alerted of his medical condition. But, these letters were not replied to. The defendant only received medical evidence of the plaintiff's illness on 11 March 2013 when she had sight of the copy of a medical certificate dated 8 March 2013 issued by Dr Goh Teck Leong. The certificate did not fully set out the reasons for the plaintiff's incapacity and it was only upon being forwarded a copy of Dr Bharathi's report on 19 June 2013, and its analysis by Dr Prem that gave the defendant the footing to file this application.

**[20]** In addition, it was said, the dramatic shift in the position taken by the

plaintiff while in mediation with the defendant and the position taken by Thomas Philip allegedly on the plaintiff's behalf after the mediation, was another reason for the application to be made. The defendant contended that based on the medical evidence, there was a justification for the filing of this application.

**[21]** In view of the medical evidence on the plaintiff's mental condition the allegation of mala fide cannot be sustained. I do not accept that the application has been made by the defendant to delay and derail the trial. In fact, it is incumbent on the defendant, in the light of the medical reports, to make such an application.

MENTAL CAPACITY TO INSTRUCT

**[22]** The law provides that the plaintiff would lack the mental capacity to instruct solicitors if he is a patient for the purposes of O 76 r 1 of the ROC. A patient is precluded by r 2 of the ROC of this Order from bringing an action or making a claim in any proceedings except by his litigation representative. Rule 1 of O 76 provides:

> In this Order —
>
> 'the Act' means the Mental Health Act 2001; 'person under disability' means a person who is minor or a patient;
>
> 'patient' means a mentally disturbed person within the meaning of the Act.

**[23]** The expression mentally disturbed is not used in the Mental Health Act 2001 ('the Act'). The expression used in the Act is mentally disordered. It would be reasonable to conclude that both terms are intended to mean the same. The statutory definition of mental disorder is found in s 2 of the Act. It reads:

> mental disorder
>
> means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and 'mentally disordered' shall be construed accordingly;

**[24]** Section 51 of the Act provides:

> 'mentally disordered person'
>
> means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs.

**[25]** The equivalent provision in the English RSC is O 80 r 1. It reads as follows:

In this Order —

'the Act' means the Mental Health Act 1983; 'patient' means a person who, by reason of mental disorder within the meaning of the Act, is incapable of managing and administering his property and affairs;

'person under disability' means a person who is an infant or a patient.

**[26]** The English and the local provision on disability are in pari materia. The English Court of Appeal had occasion in *Masterman-Lister v Brutton & Co; Masterman-Lister v Jewell and another* [2003] 3 All ER 162 to consider the meaning of the word 'patient' in RSC O 80 r 1. In that case, the court was required to decide whether the appellant Masterman-Lister was a patient at the time he commenced a personal injury claim through the respondent as his solicitors. The claim was eventually compromised. At the time the appellant commenced the action, he was a minor and as such, his father acted as his next friend. Upon coming of age, he continued with the action in his own capacity and entered into a compromise with the defendant in that action. After the entry of the compromise, an issue arose as to whether the appellant was a patient within the meaning of RSC O 80 since his accident. If so, the compromise could not stand without the approval of court pursuant to the English RSC is O 80 r 10(1) (in pari materia with O 76 r 10 of the ROC).

**[27]** The court held that the word patient should be construed in the context of RSC O 80. The relevant inquiry in this context is whether a person has the mental capacity which the law requires in a person who is permitted to purse or defend proceedings. The inquiry need not extend to the person's mental capacity to manage the whole of his property, but his capacity has to be assessed in relation to the specific transaction of commencing and conducting the litigation in question.

**[28]** Kennedy LJ said at p 172:

Mr Langstaff's formulation of that test for the present purposes was that there must be (1) understanding, and (2) retention of matters relevant to the decision, followed by (3) evaluation. Mr Francis (counsel for the Official Solicitor) submitted that a person's ability to manage his or her property and affairs required an ability to make and communicate, and where appropriate give effect to, all decisions required in relation to them. So the mental abilities required include the ability to recognize a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision. Mr Francis further submits that the court should have regard to the complexity of the decisions under consideration but not to the court's own valuation of the gravity of the decisions because it is not for the court to decide in a non-medical treatment case what is or is not serious in the life of the person before it. To that extent he is critical of the use by Wright J of the word 'sufficiently' in paragraph [29] of his judgment

A and also of the judge's failure specifically to refer to the ability to weigh information in the balance. Whilst I agree with the approach put forward by Mr Francis, I do not accept his criticisms of the trial judge.

…

B What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all 'lay client' decisions related to their actions up to and including a decision C whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the claimant is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in *White*'s case, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in D mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere.

**[29]** The test formulated in *Masterman-Lister* was reaffirmed in two subsequent decisions of the Court of Appeal in *Bailey v Warren* [2006] EWCA E Civ 51, and *Dunhill (by her litigation friend) v Burgin* [2012] EWCA Civ 397. In *Bailey*'s case, Alden LJ held at p 31:

The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters F to be considered in assessing a client's capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions that are likely to arise in litigation. Capacity to conduct such proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a G compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice. So far as Mr Bailey was concerned, the receipt of damages could have a substantial impact upon him. He would need to know what he was giving up and what would happen H if he refused to accept the offer of compromise.

**[30]** In *Dunhill*, Ward LJ held at p 15:

I With proper advice (proper explanation from legal advisers being a part of Chadwick LJ's test in 75 of his judgment) this claim would never have been advanced for the limited sums pleaded. *Since capacity to conduct proceedings includes, per Arden LJ at 126, the capacity to* give proper instructions for and to approve the particulars of claim, the Claimant lacked that capacity. For her to have capacity to approve a compromise she needed to know, again per Arden LJ at 126, what she was

> giving up and, as is conceded, she did not have the faintest idea that she was giving up a minor fortune without which her mental disabilities were likely to increase. If the litigation had been conducted properly, it would have been conducted differently. Given that scale of award and the Claimant's limited understanding of the implications arising from a claim of that size, a litigation friend should and would have been appointed for her if not when the proceedings commenced, as I believe should have been the case, then at least certainly when the compromise was under discussion. Had she been recognised to be a patient, the compromise she in fact entered into would never have been approved by the court.

**[31]** The position taken on behalf of the plaintiff is quite different. It is argued that the defendant's reliance on O 76 and the test in *Masterman-Lister* are misconceived as O 76 is primarily concerned with a litigant's capacity at the time of the institution of a suit and not thereafter. The plaintiff points out that by this application, the defendant is not seeking to challenge the plaintiff's capacity to commence this suit but his capacity to conduct this litigation at the time of the filing of the application.

**[32]** The plaintiff further argued that even if the defendant's submission based on O 76 is accepted, the plaintiff will be able to satisfy the test propounded in *Masterman-Lister* to wit:

> Whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law — whether — whether substantive or procedural — should require for the interposition of a next friend or guardian ad litem.

**[33]** I do not accept the submission of the plaintiff that O 76 is primarily concerned with a litigant's capacity at the time of the institution of a suit and not thereafter. There is nothing in O 76 to support the interpretation given to it by the plaintiff.

**[34]** The test formulated in *Masterman-lister*, can be applied to determine if the plaintiff is a patient within the meaning of O 76 as it is pari materia with the English provision. Applying the test, in order to determine whether *a person has capacity to litigate, the court has to be satisfied that* the person has the requisite mental abilities:

(a) The ability to recognise a problem;

(b) The ability to obtain and receive, understand and retain relevant information, including advice;

A (c) the ability to weigh the information (including that derived from advice) in the balance in reaching a decision; and

(d) the ability to communicate that decision.

B

THE MEDICAL EVIDENCE

**[35]** There are four medical reports to assist the court:

C (a) report prepared by Dr Bharathi dated 31 August 2012 ('Dr Bharathi's first report'),

(b) report prepared by Dr Prem Kumar dated 4 July 2013 ('Dr Prem's first report');

D (c) report prepared by Dr Bharathi dated 10 October 2013 ('Dr Bharathi's second report'); and

(d) report prepared by Dr Prem dated 30 September 2013 ('Dr Prem's second report').

E

**[36]** Both Dr Bharathi and Dr Prem had conducted a joint assessment of the plaintiff on 14 September 2013. From this joint assessment, the Bharathi's second report and Dr Prem's second report were prepared.

F

**[37]** It would be appropriate at this juncture to summarise the findings of Dr Bharathi in her first report:

(a) that the plaintiff is suffering from dementia and probably from vascular G dementia or a mixed dementia;

(b) that there was clinical evidence of significant frontal lobe dysfunction;

(c) that the frontal lobe of the plaintiff's brain is 'responsible for cognitive tasks such as planning, organizing, sequencing, applying principles, H problem solving, abstract thinking and reasoning etc'; and

(d) that the plaintiff also suffers from frontal subcortical deficits given his impaired abstract thinking, prominent lack of insight, perseveration, impaired executive functions.

I

**[38]** And, she continued at p 10, in relation to the plaintiff's ability to give evidence in court, as follows:

From a clinician's viewpoint, I believe that (the plaintiff) has diminished capacity to give evidence in court. His fitness to give evidence was considered in the following aspects:

1. The patient's ability to give a clear, consistent account of events — this aspect was impaired
2. Any delusions affecting his capacity and the evidence — in this particular aspect he had no delusions
3. The ability to understand the role and the nature of court proceedings and their obligations — his ability to follow court proceedings is impaired considering his deficits in memory (short-term, recent and even remote), working memory, concentration, abstraction and executive functions
4. Vulnerability to pressure of cross-examination and the possibility of the court proceedings affecting his mental health — (the plaintiff's) cognitive deficit renders him a vulnerable witness as he is unable to respond to in-depth questioning in a comprehensive or accurate manner
5. Even if he is asked to give evidence in the next hearing, there is another issue to consider. The underlying fact is that the condition, dementia, is progressive and degenerative. Therefore, there is great likelihood of further cognitive deterioration within projected time scales and there will be need for repeated re-assessments of capacity should there be lengthy delays in court proceedings.

**[39]** Dr Prem having read and considered the results of the tests conducted on the plaintiff by Dr Bharathi and the medical certificate dated 8 March 2013, concluded as follows:

(a) it seems improbable that (the plaintiff) was capable of properly instructing solicitors at the time of Dr Bharathi's report (31 August 2012); and

(b) it would be even more improbable for (the plaintiff) to properly instruct solicitors today (4 July 2013).

**[40]** Dr Prem's overall description of the joint assessment is found in p 2 of his second report. Of importance is Dr Prem's observation of the plaintiff's response to Dr Bharathi's interview with the plaintiff especially in respect of the current action. This is what Dr Prem observed:

(i) the plaintiff knew the reason for the dispute was a legal matter pertaining to the defendant;

(ii) although he knew the reason for the dispute, the plaintiff initially said that 'there was no problem and he was unconcerned by it as he relies on Mr Siva, his manager, whom he affectionately calls 'MIC', to handle such matters';

(iii) the plaintiff recognised his lawyer, Mr Balan, 'whom he initially said was his friend and later clarified that his duty had something to do with the case

about (the defendant). (The plaintiff) also thought that the case *was over* and hence, was not willing to talk about it'; and

(iv) *when presented with the facts pertaining to the case* and that it was not yet settled and would be coming up, (the plaintiff) said that (the defendant) could have the title if she wanted and added that Mr Siva will handle it as he does all matters.

**[41]** When Dr Prem interviewed the plaintiff, he was told that 'the dispute was actually a problem and that he was troubled when reminded of it but did not elaborate further'. The plaintiff also informed Dr Prem:

(i) that 'he did not know the technical details';

(ii) that he 'never signed documents pertaining to the transfer and that the title was with Mr Siva, who hire a lawyer to handle 4 acres of land he had in the town of Grik';

(iii) that 'if he had signed any document, Mr Siva would have checked first if that was what he wanted';

(iv) that 'he trusted Mr Siva, having been his employee for 10 years since he was 27 years of age and that he paid him a sum of RM2,500 per month for his services (Mr Siva later told (Dr Prem) he had already been working for him for 18 years)';

(v) that if there is a valid case, Mr Siva would settle the matter with his appointed lawyers but he himself cared less if there was a case or not, and that it was merely a matter of principle that if some wrong had been done, it should be rectified; and

(vi) finally, that 'he wished not to be inconvenienced as he still had a lot of property left'.

**[42]** Lastly, I turn to Dr Prem's conclusions set out at p 6 of his second report. He found that as at 14 September 2013, the plaintiff:

(a) is likely to understand the information relevant to the decision;

(b) could only possibly use, and to a lesser degree weight, the relevant information given to him in the decision-making process; and

(c) can communicate his decision to his solicitors by speaking in Hokkien, and to a lesser extent in Bahasa Malaysia, which would be understood by others.

**[43]** In addition to the above, Dr Prem also found that although the plaintiff has the mental ability to recognise that there is indeed a problem and is able to receive the relevant information given to him, 'he himself is unable to obtain such information if it is not presented to him. Hence, it may be prudent at the outset to rule out undue influence that would affect his vulnerability, namely in

the way that facts are delivered to him'.

ANALYSIS OF THE MEDICAL REPORTS

**[44]** Dr Bharathi and Dr Prem have expressed conflicting views on the mental capacity of the plaintiff to instruct solicitors. There are, however, some common observations made by them on the condition of the plaintiff. It is clear from Dr Bharathi's and Dr Prem's reports that the plaintiff was not aware of this action until he was presented with the facts pertaining to the case. He needed to be prompted that he has a ongoing case with the defendant. It appears he does not know the important details of this case and appears to have surrendered the important decisions to, one Mr Siva, who has been his employee for the last 18 years. The plaintiff had informed Dr Prem that:

> if there is a valid case, Mr Siva would settle the matter with his appointed lawyers but he himself cared less if there was a case or not, and that it was merely a matter of principle that if some wrong had been done, it should be rectified.

**[45]** It is also glaring from the reports of Dr Prem and Dr Barathi that the manifestation of the plaintiff's dementia rendered him unable to obtain information for himself and retain information relevant to a decision. In this connection, it will be useful to refer to p 8 of Dr Bharathi's report:

> Challenges in the capacity assessment: Due to his frontal lobe symptoms of preservation, he has a tendency to repeat certain phrases, 'no problem' 'inevitable' which makes it difficult to understand the context. He can also tire with repeated questioning. He has displayed problems in retaining information for long and some of his answers sound ambivalent. Due to his difficulty in retaining information, this can impact his rational reasoning and can impact his direction to others.

**[46]** Additionally, the fact that the plaintiff has been certified by Dr Bharathi to be unfit to give evidence in a court of law is a strong indication that the dementia has affected his mental capacity to instruct solicitors. If the plaintiff is unfit to understand questions and answer accordingly, it is hard to comprehend how he would be in a position to instruct solicitors for the purposes of a trial. This supports the view expressed by Dr Prem that it is improbable that the plaintiff is capable of instructing solicitors because of his mental condition.

**[47]** Based on the foregoing, I am satisfied that the plaintiff lacks the mental capacity to conduct proceedings, which includes having the capacity to instruct solicitors. He clearly fails the *Masterman-Lister* test:

(a) both Dr Bharathi and Dr Prem say that the plaintiff is unable to obtain information for himself; and

(b) both Dr Bharathi and Dr Prem say that the plaintiff is unable to retain information.

**[48]** In *Masterman-Lister*, there is this valuable statement on why it is essential that the court must ensure that a litigant has the mental capacity to institute and conduct legal proceedings. Chadwick LJ explained in para 65 as follows:

> The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; and the court is concerned not only to protect its own process but to provide protection to both parties to litigation which comes before it. A defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend. Order 80, r 2(2) was facilitative: it provided that anything which in the ordinary conduct of the proceedings is required or authorised to be done by a party to proceedings shall or may, if the party is a person under a disability, be done by his next friend or guardian ad litem.

CONCLUSION

**[49]** For the reasons given, I made an order for the plaintiff to appoint a litigation representative to take over the conduct of the proceedings within two weeks from today. I further ordered that the application to dismiss the action would be allowed, if the application is not made by the plaintiff within the time period mentioned herein.

*Order made for plaintiff to appoint litigation representative.*

Reported by Kohila Nesan